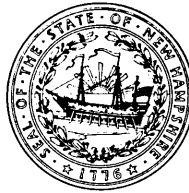


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JUL 25 1988

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July 5, 1988

Mr. James A. Carew
Chief Investigator
Office of Securities Regulations
157 Manchester Street
Concord, New Hampshire 03301

Dear Mr. Carew:

By memorandum of May 16, 1988 you have presented two questions regarding the New Hampshire Right to Privacy Act, RSA chapter 359-C (1984), and its impact upon the administrative subpoena. You first ask whether the Office of Securities Regulations (OSR or Office) must ascertain and comply with "the requirements of similar laws of other states when issuing an administrative subpoena for documents" in the possession of out-of-state banks. Your second question pertains to the application of the statute's notice procedures when "the purpose of the subpoena is to ascertain the 'customer' or holder of the [bank] account".

While answering your first question in the positive, we note that it raises a further issue as to the scope of RSA ch. 359-C (1984), which is addressed below. With respect to your second question, we conclude that OSR may ascertain the identity of a "customer" through the statute's subpoena process.

RSA 359-C governs the disclosure of financial records of a "customer" of a financial institution.¹ RSA 359-C:3, IV; State

¹The statute also regulates the disclosure of credit reports by credit reporting agencies.



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v. Sheedy, 124 N.H. 738 (1984). The statute sets forth procedures which must be followed when a state agency such as OSR seeks access to such records. Specifically, your question involves RSA 359-C:8 (1984) which requires an administrative agency to (1) serve a copy of the subpoena to the customer, and (2) identify itself and its purpose in seeking the information. The customer may move to quash the subpoena within ten (10) days of service. RSA 359-C:8, I(c) (1984).

You have inquired as to whether OSR need make prior inquiry of the existence of statutes regulating bank disclosures when the office seeks records from a foreign institution, and whether compliance therewith is necessary.² Assuming that OSR intends to pursue records through the issuance of a subpoena in New Hampshire, served in the other state, a preliminary question arises regarding OSR's power to subpoena witnesses and documents existing out of state.

The Office is without authority to issue administrative subpoenas to financial institutions in other states. This is the case because the jurisdiction of administrative agencies is limited territorially as well as by subject matter, and they may not exercise their power extra-territorially. 2 Am.Jur.2d Administrative Law, §328. Since the administrative power of OSR does not extend outside of New Hampshire, a subpoena issued by the Office to an out-of-state financial institution need not be honored. OSR cannot mandate that such financial records be disclosed. Any provision of documents referenced in the subpoena need only be voluntary, since no legal sanction attaches.

The question of voluntary compliance must be viewed in the context of any applicable privacy act which may well preclude such compliance. Protection of financial privacy through regulation is not uncommon, and at least three other states have enacted statutes substantially similar to RSA ch. 359-C (1984).³ While it is clear that OSR must comply with other

²The Office of Securities Regulation is empowered to conduct "public or private investigations within or without the state...". RSA 421-B:22, I(a) (Cum. Supp. 1987).

³See, Cal. Gov't Code §§7460-7493 (1980, 1988 Cum. Pocket Part); Nev. Rev. Stat. §239A (1986); Or. Rev. Stat. §§192.550-.595 (1987); see also, 13 Uniform Laws Annotated, Information Practices Code, pp. 277-319. The Right to Financial Privacy Act of 1978, 12 U.S.C. §§341 et seq. is the analogous federal law. That statute restricts disclosure to agencies of the United States.

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states' disclosure laws when seeking voluntary production of financial records, it is impossible to determine, without first reviewing the particular statute involved, whether a financial institution would be thereby prohibited from voluntary production. RSA 359-C:5,I (1984) for example, would appear to prohibit the voluntary production of records pursuant to an administrative subpoena issued by a foreign state agency because the subpoena is not "authorized by [New Hampshire] law". RSA 359-C:8,I (1984). A New Hampshire bank thus may not provide the records on a voluntary basis. Therefore the answer to your first question is that OSR must indeed ascertain and comply with other states disclosure laws, but the terms of the statutes which do exist may well preclude disclosure to OSR.

Assuming however that the other state does not statutorily protect the privacy of bank records or otherwise inhibit its banks from disclosing the requested records, a further question arises as to whether OSR must comply with the provisions of RSA ch. 359-C (1984) when making such a voluntary request. In other words, does the chapter "follow" a New Hampshire state agency when it operates extra-jurisdictionally? The question is of some consequence due to the statute's imposition of criminal penalties upon one who either "knowingly violates" it, or "attempts to induce" its violation. RSA 359-C:12,I,II (1984).

Because RSA ch. 359-C (1984) does not expressly indicate its territorial application it is not immediately clear whether the legislature intended that state agencies comply with its provisions when seeking out-of-state records. That determination must be made on the basis of the language of the statute, as well as its expressed purpose. See, State Employees Ass'n v. Board of Trustees, 120 N.H. 272, 273 (1980); 2 Sutherland, Statutory Constriction, §20.13 (1986).

The prescriptions of RSA ch. 359-C (1984) are directed at financial institutions and governmental agencies alike. The statute does not purport to bind however, those banks operating in other states. Further, its method of restricting state agencies, through the simultaneous notice and quash procedures, is rendered irrelevant when the agency seeks records on a voluntary basis from an out of state bank. Therefore, while RSA ch. 359-C (1984) is silent as to its territorial scope, it would be illogical to apply the notice procedues of §8 in those circumstances where use of the administrative subpoena is jurisdictionally foreclosed. See, State v. Howland, 125 N.H. 497, 502 (1984).

Nor does the statute's purpose, expressed as the "protect[ion] [of] the confidential relationship between financial institutions...and their customer", RSA 359-C:2,II (1984) conflict with this interpretation since there is no

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suggestion that the legislature intended either to protect non-residents or to bind out of state banks. Finally, this construction avoids the potential criminalization of OSR's receipt of information from other states' agencies as well as foreign financial institutions where the initial provision was legal in the other jurisdiction. Accordingly, this office is of the opinion that OSR need not comply with the procedures established in RSA ch. 359-C (1984) when it seeks bank records of out-of-state residents from institutions in jurisdiction which do not regulate their provision.

In your second question, you ask "who, if anyone, this office should notify [pursuant to RSA 359-C:8, I, (a)(1984)] if the purpose of the subpoena is to ascertain the 'customer', or holder of the account". As I understand it, your question implies that while the office has certain information relative to a particular bank account, it possesses neither a business nor a personal identifier. In such a case, compliance with the simultaneous service provision of RSA 359-C:8, I would be impossible. In this event, OSR should use its reasonable efforts to obtain identifying information from available sources. The failure of such efforts however, should not preclude issuance of the subpoena. We find no basis in the statute upon which to conclude that the purpose you indicate is not legitimate. In fact, at least one other Attorney General has similarly opined that a comparable statutory provision did not prohibit an institution from releasing a customer's name and account number to a district attorney who had neither a search warrant nor other legal process. See, 65 Cal. Ops. Atty. Gen., 4, 1-7-82.⁴ Accordingly, OSR need not notify anyone if it is unable reasonably to ascertain the customer's identity. The office should however, resume compliance if, after learning the customer's identity, it then seeks to obtain additional records.

I trust that the foregoing has been of some assistance to you. Please do not hesitate to contact me should you have further questions.

Sincerely,


Monica A. Ciolfi
Attorney

MAC/pad
O-88-017

⁴A further analogy is found at §7609(c)(2)(A) of the Internal Revenue Code. Thus, tax privacy provisions do not cover those summonses issued solely to determine the identity of a person with a number account.